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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 143

THE BALTIMORE & OHIO R. CO., ET AL., APPELLANTS

v.

THE ATCHISON, TOPEKA & SANTA FE RY. CO., ET AL., APPELLEES

No. 159

CHICAGO & NORTH WESTERN RY. CO., ET AL., APPELLANTS

v.

THE ATCHISON, TOPEKA & SANTA FE RY. CO., ET AL., APPELLEES

No. 576

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE ATCHISON, TOPEKA & SANTA FE RY. CO., ET AL., APPELLEES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN RESPONSE TO THE SUGGESTIONS OF MOOTNESS AND IN OPPOSITION TO THE MOTIONS TO AFFIRM

On February 18, 1965, the district court set aside orders of the Interstate Commerce Commission which

prescribed new bases for dividing joint rail rates between more than 300 railroads performing transcontinental freight services.[1] In the proceeding before the Commission, the carriers had aligned themselves into three geographic groups—Eastern, Midwestern and Mountain Pacific—and the Commission's orders were based on findings as to costs of performance and revenue needs of the three railroad groups. The district court rejected the group findings as inadequate to satisfy the statutory requirements of Section 15(6) of the Interstate Commerce Act. It held that the Commission was required to make individual findings for each railroad with respect to each factor relevant under Section 15(6), including specific revenue needs and the financial impact of the new divisions, in dollar amounts, for each carrier.

In our Jurisdictional Statement, filed on September 15, 1965, No. 576, O.T., 1965, we urged that this decision of the district court was in conflict with this Court's prior decisions and past Commission practice and that it would seriously impair the Commission's power effectively to conduct large rate divisions cases. Accordingly, we asked this Court to note probable jurisdiction. Jurisdictional Statements seeking

[1] One basis fixed the division of joint rates for transportation between Eastern and Mountain-Pacific territories. The other (1) prescribed new divisions between Midwestern and Transcontinental territories, and (2) increased the Midwestern share of joint rates for transportation between Eastern and Transcontinental territories as to which the Midwestern carriers performed intermediate service.

review of the district court's order were also filed by the Eastern carriers (No. 143) and by the Midwestern roads (No. 159).

Subsequent to the filing of these Jurisdictional Statements, the Eastern and Mountain Pacific railroads agreed among themselves to new divisions on transcontinental traffic which called for shares for the Eastern carriers higher than those which the Commission had sought to correct, but somewhat lower than the Commission-prescribed divisions. On January 7, 1966, the Commission granted the petition of the Eastern and Mountain Pacific lines to vacate its prior orders insofar as they prescribed divisions covered by this agreement. As a result, we agree with appellees' suggestion that the appeal in No. 143 is completely moot and that the appeal in No. 576 is moot insofar as it concerns revenue divisions of the agreeing parties.

Contrary to appellees' motion to affirm, however, we believe that the settlement between the Eastern and Mountain Pacific roads does not deprive the appeals in Nos. 159 and 576 of importance, thus making them inappropriate for plenary consideration by this Court. The settlement between the Eastern and the Mountain Pacific roads does not moot the Commission's orders insofar as they prescribe new divisions for the Midwestern roads (see footnote 1, *supra,* p. 2). The legal issues presented by the appeal of the Midwestern roads in No. 159 and the appeal in No. 576, where the United States and the Interstate Commerce Commis-

sion are the appellants, are therefore unaffected.[2] As detailed in our Jurisdictional Statement, the district court's construction of Section 15(6) of the Interstate Commerce Act substantially impairs, and perhaps entirely frustrates, the Commission's ability, in this as well as future cases, effectively to fulfill its duty to prescribe fair rate divisions.[3]

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[2] Some of the Midwestern lines—not, however, including the major Midwestern roads—have entered a settlement agreement with appellees. A petition to vacate appendices C and C1 of the Commission's orders, insofar as they would apply to the divisions of the agreeing Midwestern roads, is now pending before the Commission.

[3] Appellees also contend (Motion to Affirm of Mountain-Pacific carriers, 31–33) that the district court order should be affirmed because of the Commission's failure to consider the revenue requirements represented by passenger deficits. In prescribing new divisions of joint rates, however, the Commission in fact considered the carrier groups' net railway operating income from all services (Jurisdictional Statement of Baltimore and Ohio Railroad Co., 88a–90a, 137a–142a). It observed that although the Mountain-Pacific carriers had experienced greater losses from passenger revenues than either of the other groups during the years 1950–1958, the Eastern and Midwestern lines' net railway operating income from all services was less favorable (B & O J.S. 82a–88a, 141a). Finally, contrary to appellees' assertion, the Commission's order in *Official-Southern Divisions*, 325 I.C.C. 1, 453–454, does not reflect a repudiation of the methods for prescribing divisions which the Commission applied in the instant proceeding. While the Commission's *Official-Southern* order prescribed new divisions between Eastern and Southern carriers on the basis of cost of service and the effect of the new divisions in dollar amounts, its findings were made as to carrier groups and not as to individual lines, as required by the district court in this case.

CONCLUSION

Probable jurisdiction should be noted in Nos. 159 and 576. The appeal in No. 143 should be dismissed as moot in light of the fact that all of the appealing railroads in that case have reached a settlement with the appellee railroads.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

MARCH 1966.

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